NO. 83-6043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GREGORY SCOTT ENGLE,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

QUESTION I

THE PROSPECTIVE JURORS RUIS AND YOUNG WERE PROPERLY EXCUSED FOR CAUSE AFTER STATING THEY WERE UNABLE TO CONSIDER THE IMPOSITION OF A DEATH SENTENCE UNDER ANY CIRCUMSTANCES AND PETITIONER DID NOT PROPERLY PRESENT THE CLAIM THAT SUCH EXCUSAL RESULTED IN A "PROSECUTION PRONE" JURY WHICH DENIED HIM HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

QUESTION II

THE DECISION BELOW VACATING THE SENTENCE OF DEATH AND REMANDING FOR A NEW SENTENCING HEARING AND DETERMINATION IS NOT A FINAL JUDGMENT AND THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(3) TO REVIEW SAID DECISION. IF JURISDICTION EXISTS, THE PETITION FAILS TO DEMONSTRATE A SUBSTANTIAL FEDERAL QUESTION RESPECTING THE VALIDITY OF §921.141, FLA.STAT., EITHER ON ITS FACE OR AS APPLIED.

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PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation to Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions Involved as found on page one of the petition. Respondent does not accept the Questions Presented and has accordingly restated them.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the brief statement of the case as stated on pages one and two of the petition except the statement that the Supreme Court ". . . approved the court's [trial court] override of the jury's life recommendation. . ." (Pet. at p. 1). The Supreme Court of Florida did not reach the issue of whether the judicial rejection of the jury recommendation satisfied the requirements of Tedder v. State, 322 So.2d 908 (Fla.1975), simply because the Court vacated the sentence of death and remanded it to the trial court with "instructions to conduct another sentence hearing" without empaneling another jury, 438 So.2d at 814. The Court vacated the sentence of death because the trial judge, over the objection of trial counsel, considered a statement given by petitioner's accomplice which implicated petitioner as a coperpetrator of the homicide without affording the latter the right to confront and cross-examine Stevens in violation of this Court's decision rendered in Bruton v. United States, 391 U.S. 123 (1968), 438 So.2d at 813-814. The Supreme Court of Florida never even intimated whether the rejection of the jury recommendation could or would be sustained under Tedder for the obvious reason that the necessity of such a determination would depend on whether the trial judge on remand reimposes a death sentence. Should a life sentence be imposed, the Tedder analysis will never arise! The legal significance of this--

which will be discussed hereinafter--perhaps explains why counsel has erroneously stated the Supreme Court approved the override.

Counsel has totally failed to set forth the facts of the horrible crime of which petitioner stands convicted. The facts, which show the familiar risks encountered by citizens who must work at all-night convenience stores and demonstrate that the innocent and hard working people of this nation are totally deprived of their right to "domestic tranquility", are set out in the opinion of the Florida Supreme Court as follows:

> At approximately 2:00 A.M. on March 13, 1979, Gregory Scott Engle and Rufus E. Stevens plotted to rob the Majik Market and to remove the attendant in order that she may not be able to identify them. At approximately 4:20 A.M. on March 13, 1979, Kathy Tolin, 5 feet tall, 115 pounds, was confronted by Gregory Scott Engle, in the company of Rufus E. Stevens, with a large pocketknife, at which time she turned over the contents of the cash register to Engle, determined later to be $67.00. She was forcibly removed from the Majik Market and placed in a car owned by Rufus Stevens; at which time she was driven to a secluded wooded area nearby and both men raped her. She was then taken to an area approximately 200 feet deeper into the woods where a rope was placed around her neck and she was strangled. Then the large pocketknife was plunged into her back and her vagina was mutilated by a man's hand or a bottle. Either the rope around her neck or the knife wounds could have killer her. The four-inch tear inside the vagina was inflicted as she was dying. Her body was dragged, face down, into the underbrush almost causing one side of her face to be unrecognizable.
>
> Both defendants returned home around 7:00 A.M., March 13, 1979, and the body of Kathy Tolin was found by two boys around 10:00 A.M. on March 14, 1979.

438 So.2d at 806.

As could be expected the petitioner and Stevens who robbed together, kidnapped together and raped together, when charged with first degree murder successfully obtained separate trials so each could accuse the other of committing the homicide, when anyone familiar with both cases well knew one of the two, or both, had to kill Kathy Tolin. The victim, the only other person present, was in no position to identify her actual killer or killers.

Other facts deemed relevant to a disposition of whether this Court should grant discretionary review will be included in the argument portion of this response.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED, OR IF GRANTED, WHY THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED

QUESTION I

THE PROSPECTIVE JURORS RUIS AND YOUNG WERE PROPERLY EXCUSED FOR CAUSE AFTER STATING THEY WERE UNABLE TO CONSIDER THE IMPOSITION OF A DEATH SENTENCE UNDER ANY CIRCUMSTANCES AND PETITIONER DID NOT PROPERLY PRESENT THE CLAIM THAT SUCH EXCUSAL RESULTED IN A "PROSECUTION PRONE" JURY WHICH DENIED HIM HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

ARGUMENT

Petitioner, stating that the Florida Supreme Court's determination that prospective jurors Ruis and Young were properly excused because they could not consider the death penalty under any circumstances is "highly questionable in light of Witt v. Wainwright, 714 F.2d 1069 (11th Cir.1983)", reh. en banc denied January 4, 1984, asserts that his argument in this petition is based primarily on the recent decision in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark.1983), appeal pending, No. 83-2113 (CA8 filed August 8, 1983)--the "prosecution prone" or "guilt prone" claim--which he quotes from extensively. (Pet. at 5-7).

Respondent respectfully submits that there are several reasons why this Court should not grant review or, alternatively, should summarily affirm the judgment.

First, this claim was raised for the first time on the petition for rehearing filed in the Supreme Court of Florida.

as is evident from petitioner's appendix, and under Florida law an issue may not be raised for the first time in a motion for rehearing. Sarmiento v. State, 371 So.2d 1047, 1053 (Fla.3rd DCA 1979), approved, 397 So.2d 643 (Fla.1981).

In the petitioner's brief filed in the Supreme Court he urged that Ruis and Young were improperly excused and therefore he was deprived of his constitutional right to be tried by an impartial jury composed of people chosen from a fair cross-section of the community which precluded carrying out the sentence of death and required a vacation of the conviction (Pet. App. E 2-11). Even in the reply brief, petitioner's attorney--a different attorney than the one now representing him--asserted he was entitled to a vacation of his conviction ". . . if it is true, as maintained, that Mr. Ruis and Miss Young were impermissibly removed for cause. . ." (Pet.App. F 1).

The Grigsby claim is distinctly different from the claim tendered to the Supreme Court of Florida. Indeed, the very judge that wrote Grigsby recognized there is a difference between a Witherspoon claim and the claim presented in that case. Hulsey v. Sargent, 550 F.Supp. 179 (E.D.Ark.1982) holding Wainwright v. Sykes, 433 U.S. 72 (1977) precluded a Grigsby claim not timely presented in the state courts.

Grigsby is predicated on an entirely different theory than a Witherspoon claim. The argument there is that because the prospective juror has stated he or she could impartially decide guilt, he or she cannot be excused for cause notwithstanding the fact that he or she cannot consider the issue of punishment and is properly excused for that reason because to do so leads to a "prosecution prone" jury on the issue of guilt which denies the accused a fair and impartial jury. Inasmuch as the claims are separate discrete claims and the Grigsby claim was first presented on rehearing in violation of Florida law, petitioner

has not demonstrated his newly constructed claim presented herein was passed on by the Florida Supreme Court. Hence, petitioner has failed to demonstrate the jurisdiction of this Court as required by Webb v. Webb, 451 U.S. 493 (1981) and Cardinale v. Louisiana, 394 U.S. 437 (1969).

Secondly, petitioner's trial attorney never raised the claim presented and did not proffer any evidence to support the Grigsby theory which explains why the appellate attorney never presented the "prosecution proneness" argument to the Supreme Court, for without evidence the claim would be rejected as it was in Witherspoon, supra; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978) and Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). Of course, in Grigsby evidence was presented in that case in a timely and proper fashion, the validity and effect of which has not yet been finally determined. This petitioner, by not presenting any evidence at trial or even raising the claim at trial and on appeal, except on rehearing, is procedurally barred from presenting it under Sykes and Hulsey v. Sargent, supra.

Third, even if the issue was properly before this Court, the claim is meritless. Spinkellink v. Wainwright; Smith v. Balkcom; Maggio v. Williams, ___U.S. ___, 78 L.Ed.2d 43 (1983); Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210 (1983) and Hutchinson v. Garrison, ___ U.S. ___ (1984), Case No. A-557, Opinion filed January 11, 1984, Rehnquist, J., concurring. This "prosecution bias" claim was raised by Sullivan in his application for stay of execution and was rejected as "meritless" and in Maggio this Court vacated a stay of execution where this claim was also raised saying it warranted little discussion, 78 L.Ed. 2d at 47, because the evidence proffered was tentative and fragmentary. Justice Brennan dissented from the opinion of the Court specifically citing to Grigsby v. Mabry, supra. 78 L.Ed. 2d at 56, n. 7.

Although it is not respondent's place to challenge the non-final opinion rendered in Grigsby nor its obligation to defend the Arkansas Supreme Court's opinion issued in Rector v. State, ___ S.W.2d ___ (Ark.1983), Opinion filed October 17, 1983, 34 Cr.L. 2111, which counsel for the petitioner takes umbrage, a few words are in order.

The district court's conclusion in Grigsby is predicated upon the inference that because a person is capable of considering whether the death sentence is appropriate, he or she is thereby more likely to find a defendant is guilty of the crime charged than is a person who is unalterably opposed to the death penalty. This inference is derived from the opinions and conclusion of sociologists and scholars based upon so-called controlled studies. Even if the inference or implied bias is accurate, that does not answer the question of whether the accused received a constitutionally fair and impartial jury trial.

The Constitution only refers to an impartial jury and makes no further effort to quantify the degree of impartiality into such niches as prosecution-prone or defense-prone or gradations thereof. So long as the jurors upon voire dire are able to state under oath that they can accord the accused the presumption of innocence and will require the State to prove beyond a reasonable doubt the guilt of the defendant the constitutional right to an impartial jury has be preserved.

This very court has rightly rejected the dubious concept of implied bias--which Grigsby actually resorts to--concluding the opportunity to demonstrate actual bias by examination of the prospective jurors guarantees a defendant's right to an impartial jury. Smith v. Phillips, 455 U.S. 209 (1982). It is imperative to note that this petitioner does not allege much less demonstrate that any of the particular jurors who sat in his case were less than neutral with respect to his guilt!

This, respondent submits, must be done before he can validly claim that he was denied his constitutional right to a fair and impartial jury. Hutchinson v. Garrison, supra, Rehnquist, J., concurring; Smith v. Phillips, supra.

It should go without saying that petitioner does not want a constitutionally impartial jury, he wants a favorable one and he is not entitled to that. Spinkellink v. Wainwright, supra; Press-Enterprise Company v. Superior Court, ___ U.S. ___ (1983), Case No. 82-556, n. 9, Opinion filed January 18, 1984, 34 Cr.L. 3019,3021.

The "prosecution-prone" claim does not present a substantial federal question and therefore this Court should decline to grant discretionary review. Alternatively, if the Court determines the issue is properly before it, it should summarily affirm the judgment of guilt because the claim is frivolous and authoritatively resolved by the decisions of this Court.

Returning to the issue that was raised and disposed of by the Florida Supreme Court, to-wit: the excusal of Ruis and Young, 438 So.2d at 807-808, respondent suggests the disposition was clearly proper for each stated unequivocally that they were unable to consider imposing the death penalty under any circumstances. Witherspoon v. Illinois, supra; Spinkellink v. Wainwright, supra; and McCorquodale v. Balkcom, ___ F.2d ___, (11th Cir.1983), Case No. 82-8011, Opinion filed December 30, 1983, distinguishing Witt. Please remember all petitioner has told this Court is the excusal is "highly questionable" in light of Witt. It is, or should be, rather obvious that petitioner presupposes that Witt is a correct application of Witherspoon and its progeny and that it is factually similar. Respondent submits both suppositions are incorrect. This, however, is not the place to litigate the correctness of Witt for that will come in due course.

QUESTION II

THE DECISION BELOW VACATING THE SENTENCE OF DEATH AND REMANDING FOR A NEW SENTENCING HEARING AND DETERMINATION IS NOT A FINAL JUDGMENT AND THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(3) TO REVIEW SAID DECISION. IF JURISDICTION EXISTS, THE PETITION FAILS TO DEMONSTRATE A SUBSTANTIAL FEDERAL QUESTION RESPECTING THE VALIDITY OF §921.141, FLA.STAT., EITHER ON ITS FACE OR AS APPLIED.

ARGUMENT

Petitioner attempts to present to this Court the constitutionality of Florida's death penalty statute on the grounds that it violates the double jeopardy clause and that the standard of review established in Tedder v. State, 322 So. 2d 908 (Fla.1975) is unconstitutionally vague and incapable of non-arbitrary application.

Initially, respondent suggests that these issues are not properly before this Court for the simple fact that the decision of the Supreme Court is not a final judgment since the cause was remanded for a new hearing, as was noted earlier. Hence, this Court has no jurisdiction.

Section 1257(3) of 28 U.S.C. limits the jurisdiction of this Court to review by certiorari only "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had. . . ." Respondent respectfully suggests that the decision rendered by the Florida Supreme Court is not a "final judgment" within the meaning of 28 U.S.C., §1257, and that the petition filed herein should be dismissed. Whitus v. Georgia, 385 U.S. 545 (1967); Chapman v. California, 405 U.S. 1020 (1972).

The finality requirement which has been with us since the Judiciary Act of 1789 is "[d]esigned to avoid the evils of

piecemeal review" Republic Natural Gas Company v. Oklahoma, 334 U.S. 62 (1948), and is founded upon "considerations generally applicable to good judicial administration." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). The decisions of this Court make it clear, however, that the concept of finality should be given a practical, as opposed to a technical, construction.

The fundamental question with respect as to when a judgment is "final" is whether it can be said that there is nothing more to be decided or that there has been an effective determination of the litigation. Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69 (1946). That is, for a judgment of a state appellate court to be final and reviewable, it must end the litigation by judicially determining the rights of the parties, so that nothing remains to be done by the trial judge except the ministerial act of entering the judgment which the appellate court has directed. Parker v. Illinois, 333 U.S. 571 (1948); Organization for Better Austin v. Keith, 402 U.S. 415 (1971) and Market St. Ry. Co. v. Railroad Commission of State of Cal., 324 U.S. 548 (1945). This Court has made it clear that a state court judgment, to be within the appellate jurisdiction of this Court, must be "final" in two senses. It must be subject to no further review or correction in any other state tribunal, and must be an effective determination of the litigation and not of mere interlocutory or intermediate steps therein.

In light of the foregoing it is clear the decision sought to be reviewed is not final. Upon remand if the trial judge imposes a life sentence, the issues raised herein become moot. On the other hand, if he reimposes a death sentence, then upon appeal therefrom the Florida Supreme Court will have to decide what it has not yet decided, to-wit: whether the imposition of such sentence over the recommendation of life comports with the Tedder standard. Quite obviously if the trial judge imposes death and the Supreme Court of Florida affirms that sentence, the petitioner would be entitled to seek review in this Court.

The simple fact remains, however, that there is considerable state court action required before the sentence can be regarded as final and the federal constitutional claim may not survive that state judicial labor. The judgment sought to be reviewed simply is not "final" and this Court should decline review at this time.

Assuming this Court concludes the judgment is final, it should nevertheless deny review for the question presented insofar as it purports to raise a vagueness claim is improperly raised. Appellate counsel did not urge that Tedder created an unconstitutionally vague standard of review in a case such as this. In fact, petitioner's previous attorney embraced Tedder and argued that applying that test the trial judge erred in rejecting the jury's recommendation (Pet.App. 12-24). Oddly, in the petition for rehearing filed by present counsel there was no claim that Tedder established a constitutionally impermissible standard much less the scathing denunciation of the Florida Supreme Court's efforts to perform proportionate review of petitioner's sentence as contrasted with others similarly situated, although such review is not even constitutionally required. Pulley v. Harris, ___ U.S. ___ (1984), Case No. 82-1095, Opinion filed January 23, 1984. A constant premise throughout petitioner's analysis of the cases is that the purpose of placing the responsibility of sentencing in the hands of the trial judge was to protect the defendant by rejecting a death recommendation. (Pet. at 16,23-24). This premise illustrates that petitioner doesn't even understand the judicial function under the statutory scheme, which is to guard against unreasonable recommendations of either life or death, Dobbert v. Florida, 432 U.S. 282 (1977). The statute merely recognizes that jurys are capable of being arbitrary, either because of emotion or their general lack of familiarity

with the sentencing function. They certainly are not capable of reading decisions emanating from the Florida Supreme Court as is a trial judge who is then capable of making a legal assessment of the defendant's case. This is why the Court in Proffitt v. Florida, 428 U.S. 242,252 (1976) and in Pulley, supra, concluded Florida's statute would lead to "more consistent sentencing at the trial court level" 34 Cr.L. at 3030. In actuality, petitioner is asking this Court to engage in a proportionate review of his sentence and that is not the function of this Court, Pulley, or the federal courts. Spinkellink v. Wainwright, supra, at 604; Moore v. Balkcom,716 F.2d 1511, 1517-1519 (11th Cir.1983). Given the fact that the trial judge found four aggravating circumstances and no mitigating circumstances, which is not for this Court to re-examine or re-determine, it cannot be said that the imposition of a death sentence was arbitrary simply because a jury recommended life. If indeed there were no mitigating factors, there was nothing to weigh against the aggravating circumstances and the recommendation of life was unreasonable as a matter of law.

Petitioner's double jeopardy claim is clearly unmeritorious. Dobbert v. Strickland, 718 F.2d 1518 (11th Cir.1983) and United States v. DiFransesco, 449 U.S. 117 (1980). The claim that the statute is unconstitutional because other states have elected to employ a binding recommendation for life is foreclosed by Proffitt itself.

CONCLUSION

For the reasons stated hereinabove, this Court should decline to grant further review of this cause or it should summarily affirm the judgment of guilt entered against petitioner and found valid by the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 2nd day of February 1984.

Raymond L. Marky
Raymond L. Marky
Assistant Attorney General